U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 March 2007

BALCA Case No.: **2006-INA-00054**
ETA Case No.: P2003-CA-06359967

In the Matter of:

ANABELO C. AND DOROTHY H. BORJA,
Employer,

on behalf of

ROSALINA IGNACIO GATOS,
Alien.

Appearance: John M. Levant, Esquire
Sherman Oaks, California
For the Employer and the Alien

Certifying Officer: Jenny Elser
Dallas, Texas

Before: **Wood, Chapman, and Vittone**
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656 of the Code of Federal

Regulations ("C.F.R.").[1] The following decision is based on the record upon which the CO denied certification and the Employer's request for review with accompanying brief. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 16, 2001, the household of Anabelo C. and Dorothy H. Borja (the "Employer") filed an application for alien employment certification to enable the Alien, Rosalina Ignacio Gatos, to fill the position of Housekeeper. *AF 62*. The job to be performed was described as follows:

> Keep private home clean and orderly, cook and serve meals and render personal services to the family members. Will prepare meals as requested, serve meals and refreshments, wash dishes and clean silverware. Clean home, including furnishings, change linens and make beds, wash linens and other garments, mend and iron clothing, linens and other household articles. Perform additional duties, such as answering doorbell and telephone; Accompany employer when doing household shopping and errands as needed.

Id. Minimum requirements for the position were listed as three months of experience as a housekeeper. *Id.* The work schedule was listed as 7:00 a.m. to 4:00 p.m., Wednesday through Sunday. *Id.* The rate of pay for the position was $345.00 per week. *Id.* The Employer provided a 2002 tax Form 1040, which indicated that the household had an adjusted gross income of $107,270. *AF 58.* On July 8, 2002, the Employer filed a Registration Form For Employers of Household Workers with the state of California. *AF 55.* The Employer's 2004 tax Form 1040 indicated that the Employer's household income was $97,415. *AF 38.*

On April 18, 2005, the CO issued a Notice of Findings ("NOF") proposing to deny certification. *AF 34*. The CO initially provided two reasons for denial, but dropped one relating to newspaper advertisements before the Final Determination. *AF 35.* The remaining proposed basis for denial was that the Employer was not offering a job that is truly open to U.S. workers under 20 C.F.R. § 656.20(c)(8). *Id*. The CO noted that an employer is required under 20 C.F.R.

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

§ 656.20(c)(4) to be able to place the alien on the payroll on or before the date of the alien's entrance into the United States. *Id.* The Employer initially had no California household employer taxpayer identification number and only applied for one at the request of the California Employment Development Department. *Id.* In that application, the Employer indicated that it was a household employer and that wages were first paid to an employee in the quarter from July through September, 2002. *Id.* The CO noted that since the Employer had not had an employee before July of 2002, questions arose as to whether the Employer truly has an opening for a full-time worker and whether the Employer can afford to pay the salary offered. *Id.* Additionally, because of the work schedule and the job requirement of serving meals to family members, the CO was uncertain which meals were to be prepared and when the housekeeping work would be performed. *Id.*

As corrective action, the Employer was directed to explain how it had determined that there was a position for a housekeeper for forty hours per week and what the schedule would be. *AF 35.* The Employer was also ordered to show whether the Alien was hired in the third quarter of 2002 and, if not, to identify who was hired. *Id.* The Employer was directed to provide proof of wages paid to the housekeeper in 2002 and in subsequent years, providing W-2 forms as documentation. *Id.* The Employer was also ordered to indicate whether there was a blood or marital relationship between the Alien and the Employer and, if so, to explain how the job was truly open to U.S. workers. *Id.* Finally, the CO ordered the Employer to provide a copy of its most recent available income tax return and family expenses to show how the family could afford to pay the $17,940 per year salary for the housekeeper position. *AF 36*.

The Employer submitted a rebuttal on May 26, 2005. *AF 28.* In response to the finding that the job opportunity was questionable, the Employer explained that the size and nature of the household required a full-time housekeeper. *AF 29.* The Employer stated that the household consisted of two separate buildings on a compound. *Id.* In one house were Anabelo and Dorothy Borja and their 11-year-old son, and in the other house were Dorothy Borja's elderly parents. *Id.* The Employer explained that because Anabelo and Dorothy Borja worked twelve hours per day, six to seven days per week, they did not have time to perform household duties. *Id.* Additionally, Mrs. Borja's parents were unable to assist with household duties and Mrs.

Borja's father's health conditions required that low sodium and low-fat meals be prepared at home. *Id.* The Employer submitted a very detailed housekeeper schedule and indicated that the Alien is not related either by blood or marriage to Anabelo or Dorothy Borja. *AF 29-31.* The Employer also indicated that the Alien began working as a housekeeper in the third quarter of 2002 and continued to work for the Employer, but could not be placed on the payroll because she did not have a social security number and was paid in cash. *AF 31.* The Employer stated that the Alien will file back taxes once she receives her social security number. *Id.* The Employer noted that it had the income to pay the estimated $17,940 per year in wages to the Alien, as evidenced in its 2004 Form 1040. *Id.* The Employer also estimated that the household's assets total $640,000.00, including real estate investments and savings. *Id.* The Employer noted that monthly expenses amount to $4,150.00 and it had no credit card debt. *Id.*

The CO issued a Supplemental NOF on September 27, 2005, proposing to deny certification on two grounds. *AF 24-27.* The first was that unlawful terms and conditions of employment existed, which are prohibited under 20 C.F.R. § 656.20(c)(7). *AF 25.* The CO noted that employers of household workers are required to register as such and arrange payment of Social Security tax, Unemployment Insurance, and State Disability Insurance for their domestic employees. *Id.* Both the Internal Revenue Service ("IRS") and the California Franchise Tax Board require employers of household workers to report wages paid regardless of whether the worker was legally eligible for hire due to visa status. *Id.* The CO stated that the IRS considers performance of duties when determining who is a household worker and where no wages are being reported, there are unlawful terms or conditions of employment. *Id.* The CO determined that the Employer had hired the Alien, was not reporting wages to the federal and state authorities, and that the Employer's legal responsibility to report wages paid was unaffected by the Alien's individual tax status. *Id.* As a result, the CO determined that certification must be denied unless the Employer submitted evidence that it had reported all wages paid to the Alien since 2002 and that it was in the process of paying back taxes related to the employment of the Alien. *Id.*

Additionally, the CO proposed to deny certification in the Supplemental NOF because there remained a question of whether a current job opening existed for U.S. workers. *AF 26.*

The CO determined that the Alien performed job duties that differ from those listed in the application for labor certification. *Id.* The CO noted that the Employer's rebuttal to the initial NOF indicated that the actual position, as the Alien performed it, entailed child monitoring duties and driving requirements that were not described in the initial application for certification. *Id.* The CO also noted that the Alien cooked for senior parents in addition to the Employer and the child of the Employer. *Id.* As a result, the CO determined that the true nature of the position could not be assessed. *Id.* The CO also noted that, by failing to take responsibility for reporting the Alien's wages and treating the Alien as self-employed, the Employer would be unlikely to replace the Alien who was paid in cash with a U.S. employee whose wages must be reported. *Id*.

The CO required that the Employer take corrective action by again explaining whether anyone in the Employer's household is related to the Alien and explaining the specific relationship. *AF 27.* In addition, because the Alien performed previously undisclosed duties and a U.S. worker would require reported wages, the CO required that the Employer submit a rebuttal explaining how the labor certification position was "truly open to qualified U.S. workers." *Id.*

The Employer submitted its rebuttal to the Supplemental NOF on November 1, 2005. *AF 17-23.* The Employer first stated that it will employ the Alien under lawful terms and conditions in the future, arguing that 20 C.F.R. §656.20(c)(7) refers to lawful "job offer or job opportunity in the future" and does not refer to the current position. *AF 18.* The Employer stated that the terms of the job opportunity were in compliance with federal, state, and local laws and the Alien will be offered the lawful job opportunity when she receives permanent resident status. *Id.* In addition, the Employer argued that the CO's requirement that the Employer provide additional documentation was burdensome and was a misapplication of the regulation at 20 C.F.R. § 656.20(c)(7). *Id.*.

In response to the CO's determination that the Employer did not have a bona fide job opportunity under 20 C.F.R. § 656.20(c)(8), the Employer repeated the detailed housekeeping schedule, which included cooking for the Employer's elderly parents, driving, and childcare activities. *AF 19-20.* The Employer argued that those job duties were disclosed in the initial

application for labor certification as "personal services to family members." *AF 20.* Additionally, the Employer attached a definition of "Houseworker, General" from the Dictionary of Occupational Titles, which lists cooking, serving meals and overseeing children's activities as part of the Housekeeper's job duties. *AF 23.* The Employer also reiterated that the Alien is not related by blood or by marriage to the members of the Employer household. *Id.*

The CO denied certification in a Final Determination issued on July 13, 2006. *AF 8-10.* The CO first determined that there were unlawful terms and conditions of employment that existed and the Employer was in error in asserting that the regulations only apply to the hypothetical future terms and conditions of employment. *AF 9.* The CO also noted that the Employer was not offering to report the Alien's wages in the future, but was continuing to state that the Alien will report wages as a self-employed individual rather than an employee whose wages the Employer is required to report. *Id.* The CO concluded that the Employer is required by California and federal tax law to report wages paid to a household employee and having the Alien report her own wages is insufficient to make the terms and conditions of employment lawful. *Id.* Therefore, according to the CO, certification could not be granted according to 20 C.F.R. § 656.20 (c)(7) because of unlawful terms and conditions of employment. *Id.*

The second reason the CO denied certification was that the job was not open to U.S. workers, as required under 20 C.F.R. § 656.20(c)(8). *AF 10.* The CO determined that the Alien held the position of employment but performed job duties that were not disclosed in the application for certification. *Id.* Because the Alien was expected to act as a child monitor as well as a driver and cook in a separate house on the compound, the CO determined that there was a "combination of duties" that was not disclosed in the initial application for certification. *Id.* As a result, the state job service was unable to assess the true nature of the job. *Id.* Additionally, the CO determined that the Employer failed to demonstrate that it would be willing to replace the Alien, who was paid in cash, with a U.S. worker paid in reported wages. *Id.* The CO determined that the undisclosed job duties, along with the fact that the Alien was paid in cash, indicate that the Employer was not presenting a bona fide job opportunity open to U.S. workers as required by the regulations at 20 C.F.R. § 656.20(c)(8). *Id.*

The Employer requested administrative review of the CO's Final Determination on August 11, 2006. *AF 1.* The Employer included in its request an appellate brief. In its brief, the Employer argued that the current employment terms and conditions are irrelevant under 20 C.F.R. § 656.20(c)(7), and the future job opportunity will not be contrary to any laws. *Id.* The Employer also argued that the Alien would be put on its payroll and back taxes would be paid when she received a Social Security number. *AF 2.* The Employer then argued that the job duties performed by the Alien were consistent with those of a housekeeper under the Dictionary of Occupational Titles. *AF 2.* The matter was forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board") on September 6, 2006.

DISCUSSION

To summarize, the CO denied certification on two grounds: (1) an unlawful condition of employment pursuant to 20 C.F.R. § 656.20(c)(7); and (2) the Employer's failure to establish the existence of a bona fide job opportunity for the position of Housekeeper that is truly open to U.S. workers as required by 20 C.F.R. § 656.20(c)(8). We first address the section 656.20(c)(7) issue because we find that it is dispositive of this case.

The regulations at 20 C.F.R. § 656.20(c)(7) state that job offers filed on behalf on an alien must clearly show that "[t]he employer's job opportunity's terms, conditions and occupational environment are not contrary to Federal, State, or local law." The record in this case is clear. The Alien has worked as a housekeeper for the Employer since 2002. According to California and federal tax law, the Employer is required to report the wages it pays to the Alien. The Employer has not reported the cash wages paid to the Alien to federal or state tax authorities despite repeated warnings from the CO that this is illegal.

The Employer made no argument that the federal and state tax laws were misconstrued by the CO or that the laws do not apply to the Employer. In fact, the Employer readily admitted that its current employment practices are contrary to federal and state law. Upon inquiry, the Employer stated that it was "unable to put [the Alien] on payroll because she does not have a social security number. She is paid in cash. Once [the Alien] obtains a social security card and

the necessary documents, she will be filing back taxes." *AF 31*. The Employer argued that the terms and conditions of employment will become lawful *in the future* because the Alien will become compliant with the tax law that applies to her. Whether the Alien properly reports her wages is irrelevant. The Employer has not complied with applicable tax laws because it has failed to report the wages it has paid to the Alien. The regulations allowing the Alien to adjust her immigration status do not provide a free pass for an Employer who continuously violates federal and state tax laws throughout the certification process. The CO correctly determined that the Employer was not offering a position with lawful terms and conditions of employment because the Employer has yet to come into compliance with federal and state tax laws. The CO properly denied certification under 20 C.F.R. §656.20(c)(7).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

Administrative Law Judge, Pamela Lakes Wood, concurring.

I concur in the result based upon the lack of a bona fide job opportunity open to U.S. workers, in contravention of 20 C.F.R. § 656.20(c)(8).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.